No. 78-217

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Petitioner,

v.

MCI TELECOMMUNICATIONS CORPORATION, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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August 1978

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Page

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Petitioner American Telephone and Telegraph Company requests that a writ of certiorari be issued to review the opinion and order of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The April 14, 1978, opinion of the Court of Appeals, which is not yet officially reported, appears as Appendix A to this petition.[1] The lower court's subsequent opinion denying a motion for a stay pending certiorari, which is not officially reported, appears as

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[1] The appendices are separately bound in a companion volume cited as "Pet. App."

Appendix B. The February 28, 1978, Memorandum Opinion and Order of the Federal Communications Commission, which is not yet officially reported, appears as Appendix C.

JURISDICTION

The order of the Court of Appeals entered April 14, 1978, which together with its opinion constitutes its judgment in this case, appears as Appendix D. The Court of Appeals denied rehearing and suggestion of rehearing *en banc* on May 8, 1978, by orders which appear as Appendix E. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Congress in Section 201(a) of the Communications Act of 1934, 47 U.S.C. § 201(a), provided that physical connections between carriers may be ordered only after a hearing and findings by the Federal Communications Commission that the interconnections sought are "necessary or desirable in the public interest." In this case, the District of Columbia Circuit has—over the Commission's objection—directed the Commission to order that physical connections be established between telephone companies and a specialized carrier to permit the latter to offer long distance telephone service ("switched public message service"). The questions presented are:

1. Whether in mandating physical connections, the Court of Appeals unlawfully exercised an administrative function which Congress in Section 201(a) explicitly reserves to the Commission and which can validly be exercised only after public interest findings that the Commission has not made in this case.

2. Whether the Court of Appeals, in extending existing interconnection obligations to switched public message service, impermissibly contradicted a contrary prior decision of the Third Circuit rendered under a statute giving the Third Circuit "exclusive jurisdiction" to review the Commission's interconnection orders. 28 U.S.C. § 2349.

STATUTES INVOLVED

Pertinent provisions of the Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq.*, and the Hobbs Act, 28 U.S.C. § 2341 *et seq.*, appear as Appendix F.

STATEMENT OF FACTS

A. The Statutory Plan and Background of This Case

The FCC authorizes common carriers to construct, acquire and operate communications facilities under Section 214 of the Act, 47 U.S.C. § 214.[2] A carrier then makes its offering to the public by filing tariffs pursuant to Sections 203-05 of the Act, 47 U.S.C. §§ 203-05. A Section 214 authorization, however, relates only to the use a carrier may make of its own facilities and provides a carrier no right to compel other carriers to interconnect with it. Interconnection rights can be conferred only after a separate affirmative determination by the Commission under a different provision of the Act.

Carrier interconnection rights and obligations are controlled by Section 201(a), which imposes a limited

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[2] If a carrier uses radio facilities, it is also required to obtain radio facility construction permits and licenses under Title III of the Act. Sections 308-09, 47 U.S.C. §§ 308-09.

qualification on a carrier's common law right not to provide physical connections with other carriers.[3] Section 201(a) directs a carrier to establish physical connection with another carrier only "in accordance with the orders of the Commission" issued after opportunity for hearing.[4] Section 201(a) requires, as a condition precedent to interconnection orders, that the FCC affirmatively find that the proposed provision of interconnection facilities will be necessary or desirable in the public interest. *Bell Telephone Company of Pennsylvania* v. *FCC*, 503 F.2d 1250, 1270 (3rd Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975).[5]

In 1971, the FCC created a class of common carriers known as "specialized carriers," and proposed to grant them Section 214 and Title III authorizations to provide specialized private line telecommunications services using microwave radio.[6] The FCC

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[3] *E.g.*, *Oklahoma-Arkansas Telephone Co.* v. *Southwestern Bell Telephone Co.*, 45 F.2d 995, 997 (8th Cir. 1930), *cert. denied*, 283 U.S. 822 (1931). Section 201(a) "does not require the establishment of through routes in the absence of an order by the Commission, nor does it provide for the compulsory establishment of physical connection between carriers" absent such an order. *Hearings on H.R. 8301 Before the House Committee on Interstate and Foreign Commerce*, 73d Cong., 2d Sess. 14 (1934).

[4] Section 201(a) provides: "It shall be the duty of every common carrier . . . in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers . . . ." 47 U.S.C. § 201(a).

[5] A copy of the Third Circuit's opinion appears as Appendix G.

[6] *Specialized Common Carrier Services*, 29 F.C.C.2d 870 (1971), *aff'd sub. nom. Washington Utils. & Transp. Comm'n* v. *FCC*, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975). A private

distinguished "private line" service from switched "public message" services like ordinary long distance telephone service. 29 F.C.C.2d at 911, 915.[7] The decision did not make any affirmative finding in favor of switched public message competition (see p. 8, below). Similarly, it made no determination that the Bell System should provide interconnection facilities to specialized carriers for use in providing this service, an issue that was not even before the Commission.

Thereafter, MCI—one of the specialized carriers authorized by the FCC—sought to connect its intercity lines with local exchange facilities of the Bell System so that MCI could provide certain services subsequently deemed to be private line services by the Commission. The FCC instituted a separate interconnection proceeding under Section 201(a). After extensive submissions, the FCC entered orders expressly designed to achieve its objective of private line competition. *Bell System Tariff Offerings,* 46 F.C.C.2d 413, 427 (1974). The orders required the Bell System to provide interconnection facilities to

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line service—providing dedicated circuits—is one "whereby facilities for communication between two or more designated points are set aside for the exclusive use or availability for use of a particular customer and authorized users during stated periods of time." 47 C.F.R. § 21.2.

[7] The Department of Justice supported this distinction. Brief of the FCC and United States, pp. 4-5, *Washington Utils. & Transp. Comm'n* v. *FCC, supra;* brief of FCC and United States, pp. 5-6, *Bell Telephone Company of Pennsylvania* v. *FCC, supra.* A public message service—such as ordinary long distance telephone service—is one "whereby facilities are offered to the public between all points served by a carrier or by interconnected carriers on a non-exclusive message-by-message basis, contemplating a separate connection for each occasion of use." 47 C.F.R. § 21.2.

specialized carriers for specialized and other private line services. *Id.* at 438.

On review, the Third Circuit affirmed the FCC's interconnection orders in *Bell Telephone Company of Pennsylvania* v. *FCC, supra.* The Bell System argued that the interconnection orders were unduly vague and overbroad. The Third Circuit agreed that the interconnection orders would be "overbroad" if read abstractly (503 F.2d at 1273-74 (Pet. App. 42g)); but it sustained them on the ground that they only required, and validly could only require, the Bell System to provide specialized carriers with "those (interconnection) elements of *private line* services" which were supplied within the Bell System. *Id.* (emphasis added). This construction of the FCC interconnection orders was urged in the Third Circuit by the FCC, the Department of Justice, MCI and another specialized carrier, Southern Pacific Communications Company.[8]

The statute governing review of such FCC orders conferred on the Third Circuit "exclusive jurisdiction" over the interconnection orders, as soon as the Bell System filed its petition for review in that circuit and the record was lodged there by the Commission. 28 U.S.C. § 2349(a).[9] After this Court denied certiorari in *Bell of Pennsylvania,* the Third Cir-

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[8] Brief of FCC and United States, p. 49 & n.14; MCI Brief pp. 52-53; SPCC Brief p. 61, each of which is quoted at paras. 48-49 of the FCC's February 28, 1978 Memorandum Opinion and Order. (Pet. App. 28c-29c).

[9] That provision of the Hobbs Act provides in pertinent part: "The court of appeals in which the record is filed . . . has exclusive jurisdiction to make and enter . . . a judgment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency."

cuit's decision determining the scope and validity of the Bell System's interconnection obligations became "final" (28 U.S.C. §§ 2349, 2350) and not subject to further review or collateral attack.

B. The Proceedings Below

In January 1975, MCI began to offer its so-called Execunet service.[10] After lengthy proceedings, the FCC determined that Execunet was clearly equivalent to ordinary long distance telephone service and therefore a switched public message service rather than a private line service.[11] Accordingly, the FCC rejected the Execunet tariff as purporting to provide an unauthorized service. *MCI Telecommunications Corp.*, 60 F.C.C.2d 25 (1976). Since it found Execunet beyond the scope of MCI's lawful authority, the FCC had no occasion to consider whether the Bell System was or should be obligated under Section 201(a) to

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[10] Execunet is a replica of ordinary long distance telephone service. As with ordinary long distance service, Execunet customers, utilizing local telephone company exchange facilities, can call from any telephone in one city to any telephone in a distant city on a call-by-call basis; each call requires a new connection; each call is charged a rate based on the distance called and the length of the call, subject to a monthly minimum; and the calls utilize circuits and switching facilities which are not exclusively dedicated to each customer but are utilized by different customers in turn. *MCI Telecommunications Corp.*, 60 F.C.C.2d 25, 42, 59-62 (1976).

[11] The operations of ordinary long distance service (Pet. App. 1h) and of Execunet (Pet. App. 2h) are illustrated in two diagrams, introduced by AT&T in *MCI Telecommunications Corp., supra,* which are reproduced as Appendix H.

provide connections to MCI to assist MCI in providing such a service.[12]

In July 1977, the District of Columbia Circuit reversed the rejection of MCI's tariffs. *MCI Telecommunications Corp.* v. *FCC*, 561 F.2d 365, *cert. denied*, 98 S. Ct. 781 (1978) (*"Execunet"*).[13] The lower court did not disturb the FCC's finding that Execunet was the functional equivalent of long distance telephone service (561 F.2d at 378 (Pet. App. 25i)), but it found that the FCC had never determined *whether* competition in ordinary long distance service would serve the public interest. *Id.* at 380 (Pet. App. 30i). Under the lower court's reading of Section 214, the FCC had to resolve this issue before it could limit MCI to providing private line service.[14] The *Execunet* decision did not purport to decide any interconnection issue; in fact, it distinguished *Bell of Pennsylvania* as involving "a very different issue." *Id.* at 378 n.59 (Pet. App. 25i).

Following the denial of certiorari in *Execunet*, the Bell System promptly asked the FCC to confirm that existing interconnection orders affirmed in *Bell of*

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[12] The Bell System, initially unaware of the actual nature of Execunet, furnished MCI with a limited number of interconnection facilities which MCI then used to provide Execunet. When AT&T discovered that MCI was actually providing ordinary long distance telephone service, AT&T asked the Commission to investigate.

[13] The *Execunet* opinion appears as Appendix I.

[14] The Court of Appeals held that even though an applicant has sought only limited authority, once facilities authorizations have been granted to a carrier, it can use them to provide any service it chooses unless the FCC imposes explicit restrictions based on public interest findings. 561 F.2d at 380 (Pet. App. 30i).

Pennsylvania did not extend to Execunet.[15] The Bell System pointed out that the interconnection orders were clearly limited by the Third Circuit, consistent with the FCC's own representations, to interconnection elements of "private line services" (503 F.2d 1273-74 (Pet. App. 42g)); and that the Commission had now explicitly ruled in *Execunet*—a ruling not questioned by the lower court—that Execunet was not a private line service. 60 F.C.C.2d at 43-44. Accordingly, if MCI desired interconnection facilities from the Bell System for Execunet-type services, a prior hearing and public interest findings were required under Section 201(a) before such an obligation could be imposed.

In a decision released on February 28, 1978 ("MO&O"), the Commission granted the declaratory order sought by the Bell System. Pet. App. 1c. It confirmed that its own prior orders in *Bell System Tariff Offerings* imposed interconnection obligations only with respect to private line services. MO&O, para. 58 (Pet. App. 34c). The Commission also recognized that it was "bound by the Third Circuit's interpretation" of *Bell of Pennsylvania* that the existing interconnection orders were "limited to private line services." *Id.*, para. 56 (Pet. App. 32c-33c). Moreover, the FCC conceded that the Bell System never had notice or hearing on any broader intercon-

[15] After the Commission's *Execunet* decision, the lower court stayed further expansion of Execunet service, so that no new interconnection facilities were sought; but when the lower court's stay dissolved after the denial of certiorari, AT&T anticipated that it would receive numerous new demands for interconnection facilities. In *Bell of Pennsylvania*, the United States and the FCC advised the Third Circuit in response to the overbreadth argument that "AT&T can seek guidance from the Commission" if questions arose as to the extent of the Bell System interconnection obligations. Brief of FCC and United States, p. 49 n.14.

nection obligation, because—as the *Execunet* decision recognized—the FCC had never purported to consider whether competition for public switched message services should be introduced. *Id.*, para. 62 & n.8 (Pet. App. 37c-38c).

MCI did not seek judicial review in the Third Circuit despite the fact that the interconnection orders in question had been definitively construed in *Bell of Pennsylvania*. Instead, MCI filed a petition in the District of Columbia Circuit, purportedly seeking compliance with the *Execunet* mandate. Even though the *Execunet* decision said nothing about interconnection obligations, MCI's motion sought an order directing the FCC to require the Bell System to provide physical connections, so that MCI could use Bell System facilities to expand Execunet while the public interest impact of such expansion was being considered by the FCC.

On April 14, 1978, the lower court granted MCI's motion.[16] In his "mandate" decision—to which this certiorari petition is directed—Chief Judge Wright admitted that the original "*Execunet* decision is not addressed explicitly to the interconnection issue or to AT&T's obligation to provide interconnection . . . ." Slip op. 11 (Pet. App. 10a-11a). Nevertheless, based on his disapproval of the Commission's reasoning, he granted MCI's motion and summarily directed the Commission to order physical connection for switched public message service. See Pet. App. 15a. The lower

[16] See Pet. App. 1a (opinion), 1d (order). The lower court subsequently issued a memorandum denying a stay pending certiorari which repeated various contentions made in its opinion granting MCI's mandate motion. See Pet. App. 1b.

court reached this result even though Section 201(a) clearly reserves to the Commission the affirmative decision to order interconnection based on findings that such interconnection is "necessary or desirable in the public interest." 47 U.S.C. § 201(a).

In sum, this case is quite different from the original *Execunet* decision. There, the issue was whether Section 214 permitted the Commission to limit a carrier's use of its own facilities, absent public interest findings to support that limitation.[17] Here, the question is whether a federal court has power, in light of Section 201(a) of the Act, to mandate physical connections between carriers where that function is explicitly reserved to the agency and the agency has never made the public interest findings which are a statutory prerequisite to such interconnection orders.

ARGUMENT

Certiorari is warranted in this case for two distinct reasons. First, by requiring the Commission to order interconnection, the decision below usurps the exercise of an administrative power explicitly reserved by Congress to the agency under Section 201(a). The lower court's assumption of the role of super-commission conflicts directly with this Court's admonitions in recent cases, including *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council,* 98 S.Ct. 1197 (1978). The lower court's attempt to dictate the exercise of agency authority is directly

[17] In accordance with *Execunet,* the Commission has begun a proceeding to determine whether the public interest warrants the provision of switched public message services on a competitive or non-competitive basis. Notice of Inquiry and Proposed Rule Making, FCC 78-144, March 3, 1978.

contrary to a decision of this Court involving a similar instance of asserted "mandate" construction. *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940).

Second, the lower court's order requires the FCC to violate a prior, controlling mandate of the Third Circuit. The Third Circuit, having acquired "exclusive jurisdiction" to review the FCC's interconnection orders, construed them as limited to "private line" service and found that they would be overbroad and unsustainable if not so limited. The D.C. Circuit's conflicting construction of the *same* interconnection obligations to extend them to switched public message service invades the Third Circuit's "exclusive jurisdiction" under the Hobbs Act and the finality accorded by that statute to the Third Circuit's prior adjudication. See *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320 (1958).

I. The Lower Court Has Usurped the Commission's Statutory Power To Order Interconnection and Ignored Congress' Requirement of Public Interest Findings by the FCC.

In Section 201(a), Congress confided to the Commission the power to require physical connections between carriers to the extent ordered by the agency. The carrier, prior to being ordered to interconnect, must be afforded a hearing. 47 U.S.C. § 201(a). Any interconnection order itself must be supported by findings showing that the interconnection is "necessary or desirable in the public interest." *Id.* Such public interest findings, which only the FCC can make, are a "condition precedent" to imposition of any interconnection obligation. *Bell Telephone Company of Pennsylvania* v. *FCC, supra*, 503 F.2d at 1270 (Pet. App. 35g).

The Commission has never ordered interconnection for switched public message service or made any public interest findings to support such interconnection. Certainly no such order was issued in the *Specialized Carrier* case: the lower court's own *Execunet* decision explicitly held that the *Specialized Carrier* decision had not even purported to decide whether switched public message competition would be in the public interest.[18] Absent such a threshold determination, the Commission could not and did not consider whether interconnections should be ordered to assist specialized carriers to provide switched public message service.

Similarly, in *Bell System Tariff Offerings,* the Commission's interconnection orders were expressly designed to assure full and fair competition in the provision of "private line" service. 46 F.C.C.2d at 426. The Commission, supported by MCI, so construed its interconnection order on direct review in the Third Circuit. See p. 6, above. The Third Circuit similarly construed the order as limited to interconnection elements of "private line service." 503 F.2d at 1273-74 (Pet. App. 42g). Even without these prior constructions, the Commission's consistent reading of its own order would, under decisions of this Court, be entitled to controlling weight.[19]

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[18] The *Execunet* decision specifically emphasized that the court was not attempting to decide "whether competition like that posed by Execunet is in the public interest," and said that "[t]hat will be the question for the Commission to decide" on remand. 561 F.2d at 380 (Pet. App. 30i).

[19] *Udall* v. *Tallman,* 380 U.S. 1, 16-17 (1965); *Immigration and Naturalization Service* v. *Stanisic,* 395 U.S. 62, 72 (1969); *Bowles* v. *Seminole Rock & Sand Co.,* 325 U.S. 410, 414 (1945).

The lower court's error, however, goes far beyond an unjustified reversal of the Commission. What the lower court did in granting MCI's petition was to *direct* the Commission to order the interconnection facilities sought by MCI. This affirmative requirement of interconnection, summarily imposed by the court over the Commission's objection, is a complete reversal of proper roles and constitutes the usurpation of administrative power repeatedly condemned by this Court. The authority to review an agency order "is not power to exercise an essentially administrative function." *FPC* v. *Idaho Power Co.*, 344 U.S. 17, 21 (1952).[20]

As the *Idaho Power* decision makes clear, the "function of the reviewing court ends when an error of law is laid bare. At that point the matter goes once more to the Commission for reconsideration." 344 U.S. at 20. Even if the Commission's reasoning in this case were inconsistent with the lower court's reasoning in a prior decision—which it is not[21]—a

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[20] This judicially imposed interconnection requirement also violates the rights of the obligated carriers under Section 201(a), since—as the Commission itself admitted—it has never made the public interest findings on which a valid interconnection order for Execunet would have to rest. See MO&O, para. 60 (Pet. App. 36c).

[21] The lower court held in *Execunet* that the lack of a public interest determination for or against Execunet-type competition prevented the FCC from imposing a valid condition limiting MCI's service authority under Section 214. But the lack of such an affirmative determination equally precludes imposing an interconnection obligation on another carrier to provide Execunet interconnections. The Commission's position in this case is thus completely consistent with the reasoning of the original *Execunet* decision. It is the lower court that has now disregarded its own prior reasoning and determinations.

properly constituted reviewing court can do no more than to reverse and remand the matter so that the agency can reconsider the matter free of its original error.[22] What the reviewing court cannot do is to tell the Commission how ultimately it must resolve a question of public policy, as the lower court did here, or to require the agency, as the lower court did here, to order a specific class of interconnections.

The lower court's reliance upon its *Execunet* mandate is fanciful. The interconnection issue was not decided by the Commission in rejecting MCI's Execunet tariff; it was not raised by MCI in its review petition; and it was not briefed by the parties in the lower court in *Execunet* itself. The original *Execunet* decision contains no mention of interconnection except to distinguish *Bell of Pennsylvania* as involving "a very different issue" (561 F.2d at 378 n.59 (Pet. App. 25i)), and the lower court has admitted that the "*Execunet* decision is not addressed explicitly to the interconnection issue or to AT&T's obligation to provide interconnecton . . . ." Slip op. 11 (Pet. App. 10a-11a).[23] Since the *Execunet* decision did not address the interconnection issue, the mandate necessarily

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[22] The principle of *Idaho Power* has been underscored by this Court's action in summarily reversing lower courts which have disregarded the principle and sought to dictate the outcome of agency proceedings. See, *e.g.*, *South Prairie Construction Co.* v. *Local No. 627, Int'l Union of Operating Engineers*, 425 U.S. 800, 805-06 (1976); *United States* v. *Saskatchewan Minerals*, 385 U.S. 94 (1966); *Arrow Transp. Co.* v. *Cincinnati, N.O. & T.P. Ry.*, 379 U.S. 642 (1965).

[23] Indeed, the *Execunet* case had nothing whatever to do with Bell System facilities or obligations. As examination of the decision readily confirms, the decision was concerned solely with MCI's facilities and the existence of conditions limiting their use.

"left the matter open for consideration" on remand and its subsequent resolution by the agency could not violate the mandate. *Perkins* v. *Standard Oil Co.*, 399 U.S. 222, 223 (1970).

Whatever hidden meaning may be attributed to the *Execunet* mandate, the decisive point is that the lower court lacked *power* to dictate the exercise of an administrative function. *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940). In *Pottsville*, as here, the lower court purported to construe its own prior mandate to require affirmative action by the agency in a matter committed to the agency—there, to grant a broadcast license to an applicant. In reversing, this Court held that however the lower court might choose to read its earlier mandate, the power to grant licenses (under Sections 308-09) was entrusted to the Commission and not to the circuit court. 309 U.S. at 141-46. The reasoning and holding of *Pottsville* apply with equal force to the FCC's power to order interconnection under Section 201(a).

Only recently this Court in *Vermont Yankee* reminded the lower court against procedural decisions that "unjustifiably intrude[ ] into the administrative process" based on policy preferences of the reviewing court.[24] Yet it should be equally plain that reviewing courts must also respect agency power to decide *substantive* policy questions, which lie at the very core of agency expertise and authority. *Vermont Yankee* itself pointed in this direction when it warned

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[24] *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council*, 98 S.Ct. 1197, 1218 (1978). See also *FCC* v. *National Citizens Committee for Broadcasting*, 98 S.Ct. 2096, 2111 n.15 (1978).

against procedural requirements which, "under the guise of judicial review," undercut the policy determinations made by Congress. 98 S.Ct. at 1219.

In Section 201(a), Congress determined to entrust to the Commission the power to decide whether and to what extent interconnection should be ordered. When, as here, a lower court summarily tells the Commission that it must order interconnection for switched public message service, the lesson of *Vermont Yankee* has not been understood. This case presents the opportunity for this Court to determine and emphasize that *Vermont Yankee* applies with equal force to *substantive* issues entrusted by Congress to agency resolution.

II. The Lower Court's Decision Directly Conflicts With the Decision of the Third Circuit and Invades the Latter Court's "Exclusive Jurisdiction" Under the Hobbs Act.

In 1974, the Bell System petitioned the Third Circuit under the Hobbs Act, 28 U.S.C. §§ 2341-50, to review the Commission's interconnection orders. Responding to the Bell System's charge that the interconnection orders were unduly vague and overbroad, the Third Circuit found that the history and purpose of the interconnection orders gave them "a definite meaning" far short of an obligation to interconnect for switched public message services:

> "As we read the [*Bell System Tariff Offerings*] order, the FCC has required AT&T to provide to the specialized carriers those (interconnection) elements of *private line* service which AT&T supplies to its affiliates and furnishes to customers through its Long Lines Department." 503 F.2d at 1273-74 (Pet. App. 42g) (emphasis added).

This delineation of the interconnection obligation, limiting it to "private line" service, was a *holding* relied on by the Third Circuit to rescue the orders from charges of vagueness and overbreadth.[25] The holding was consistent with, and supported by, the representations of the Commission, the Department of Justice, and the specialized carriers. See MO&O paras. 48-49. (Pet. App. 28c-29c). Since the Commission has never issued any subsequent Section 201(a) order to the Bell System, the Third Circuit's decision definitively establishes the scope of the Bell System's existing interconnection obligations.

The lower court in this case lacked the power under the Hobbs Act to disregard the Third Circuit's decision and extend the Bell System's interconnection obligations to a service found by the Commission to be equivalent to ordinary long distance service.[26] Once the original Bell System petition for review and the record were filed in the Third Circuit, the Hobbs Act conferred on that court "exclusive jurisdiction" over the orders, and the court's determinations were "final" under the statute. 28 U.S.C. §§ 2349, 2350. Construing a parallel statute, this Court clearly held

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[25] Elsewhere in the opinion the Third Circuit characterized the orders as ones that require the Bell System "to furnish to MCI . . . the interconnection facilities necessary to provide *private line* services." 503 F.2d at 1254 (Pet. App. 2g) (footnote omitted) (emphasis added).

[26] The lower court never questioned the FCC's holding that Execunet is plainly a switched public message service equivalent to ordinary long distance service. See slip op. 20 (Pet. App. 19a). That FCC determination is both within the scope of the agency's expertise (*Interstate Broadcasting Co.* v. *FCC*, 265 F.2d 598 (D.C. Cir. 1959)) and is clearly supported by cogent reasoning and determinations. 60 F.C.C.2d at 43-44.

that such judicial review provisions create a "specific, complete and exclusive mode for judicial review" and the resulting decision precludes any "collateral attack upon, and *de novo* litigation between the same parties of issues determined by, the final judgment" of the initial reviewing court. *City of Tacoma* v. *Taxpayers of Tacoma,* 357 U.S. 320, 336, 341 (1958).[27]

The "exclusive jurisdiction" provision of the Hobbs Act is designed to avoid conflicts by channeling proceedings to review individual FCC orders into a single court of appeals with authority to issue a "final" determination. When the lower court disregarded the determination on interconnection obligations reached previously by the Third Circuit, it not only conflicted with the Third Circuit but also violated the "exclusive jurisdiction" and finality provisions of the statute.[28] Certiorari is warranted to assure compliance with an important jurisdictional statute allocating authority among reviewing courts.

Moreover, there is a direct conflict between the Third Circuit and the District of Columbia Circuit. The Commission issued interconnection orders in 1973 and, on direct review, the Third Circuit held them to be lim-

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[27] The review statute involved in *Tacoma* is a counterpart to the Hobbs Act. *Compare* Section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b) (quoted in 357 U.S. at 335), *with* 28 U.S.C. §§ 2349, 2350.

[28] Under the "exclusive jurisdiction" provision, the D.C. Circuit clearly could not have acted on the interconnection orders after the record was filed in the Third Circuit and while the case was awaiting decision. 28 U.S.C. § 2349. Clearly, the Third Circuit's exclusive authority is, if anything, even greater once it has reached a "final" decision.

ited to "private line" service and therefore valid in the face of charges of vagueness and overbreadth. See p. 17, above. In direct conflict, the District of Columbia Circuit has now said that Bell System interconnection obligations, which arise out of the same orders construed by the Third Circuit, extend to a service found by the Commission to be a public switched message service and not a private line service. Slip op. 2-3 (Pet. App. 2a). The agency and the telephone industry cannot obey both circuit courts, and they deserve a definitive resolution of the conflict by this Court.

The decisions create not merely a conflict but a logical impossibility. The Third Circuit made clear that it would have accepted the Bell System's overbreadth argument if the Commission interconnection orders extended beyond private line service. 503 F.2d at 1273 (Pet. App. 42g). The District of Columbia Circuit has now declared that the Bell System is required to provide interconnection for service that is not private line. The District of Columbia Circuit's determination would therefore render the interconnection orders themselves invalid under the Third Circuit's decision, and MCI would be entitled to no interconnection whatever. Such an anomoly virtually requires that one tribunal consider the entire controversy at one time, and confirms the wisdom of both the "exclusive jurisdiction" provision of the Hobbs Act and this Court's *City of Tacoma* decision.

The lower court's attempts to distinguish the prior Third Circuit decision actually underscore the existence of a direct conflict. First, the lower court asserts that the Third Circuit was only required to determine whether the interconnection orders reached the two services initially involved in *Bell of Pennsylvania,* and

therefore—it claims—the question whether the orders reached Execunet remained open. Slip op. 17-19 (Pet. App. 15a-19a). However, in order to sustain the interconnection orders against charges of overbreadth the Third Circuit had to, and did in fact, construe those orders as confined solely to private line service (503 F.2d at 1273-74 (Pet. App. 42g); and the Commission has ruled definitively that Execunet is not a private line service.

Secondly, the lower court suggests that the Commission recognized more recently that interconnection obligations are not necessarily limited to conventional private line services, but extend to all "specialized" interstate services. Slip op. 21 (Pet. App. 20a). Even if this were so, the Commission has explicitly ruled that Execunet is the equivalent of ordinary long distance service. Whatever scope may be given to terms like "private line" and "specialized" service, the Commission has consistently ruled that these concepts do not embrace services, such as Execunet, that are merely replicas of ordinary long distance service.[29]

The very existence of this direct conflict between the circuits reaffirms the need for a determination by this Court on the fundamental issue posed under the Hobbs Act. By ignoring the exclusivity and finality provisions of that statute, the lower court has reached a determination on the scope of FCC orders contrary to that earlier reached by another court of

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[29] It is difficult to conceive of any service less "private" or "specialized" than one that duplicates the essential capabilities of ordinary long distance service. In any case, the FCC's determination that Execunet is not a private or specialized service represents a construction by the Commission of its own technical nomenclature.

appeals, in litigation between the same parties, concerning precisely the same FCC orders. If the plan of judicial review ordained by Congress in the Hobbs Act is to function—and the agency and parties are to be protected against conflicting mandates—then the statutory question of jurisdictional priority posed by this case must be resolved by this Court.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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August 1978